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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 552

WILLIAM FREDERICK ZIMMER,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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INDEX

Jurisdiction 2

Questions Presented 2

Statement of the Case 2

Argument—

I. There Was No Unreasonable Search of Petitioner's Automobile 7

II. The Judgment Below Rejecting Petitioner's Search and Seizure Claim Rests on an Adequate and Independent Ground of Kansas Law 10

III. Petitioner's Right to Counsel and His Right to Adequate Time for Preparation Were Not Denied 11

Conclusion 14

Table of Cases

Chapman v. *United States*, 346 F.2d 383 (9th Cir. 1965), *cert. denied* 383 U.S. 909 (1965) 9

Escobedo v. *Illinois*, 378 U.S. 478 (1964) 13

Hamilton v. *Alabama*, 368 U.S. 52 (1961) 13

Henry v. *Mississippi*, 379 U.S. 443 (1965) 10, 11

Massiah v. *United States*, 377 U.S. 201 (1964) 13

Miranda v. *Arizona*, 384 U.S. 436 (1966) 13

Robbins v. *MacKenzie*, 364 F.2d 45 (1st Cir. 1966), *cert. denied* 385 U.S. 913 (1966) 9

Robinson v. *United States*, 325 F.2d 880 (5th Cir. 1964) 9

Ruhl v. *United States*, 148 F.2d 173 (10th Cir. 1945) 9

Shores v. *United States*, 174 F.2d 838 (8th Cir. 1949) 9

State v. *Donahue*, 197 Kan. 317, 416 P.2d 287 (1966) 10
State v. *Freeman*, 195 Kan. 561, 408 P.2d 612 (1965) 10
State v. *Wade*, 190 Kan. 624, 376 P.2d 915 (1962) 10
United States v. *Brown*, 296 F.2d 565 (4th Cir. 1961) 9
United States v. *Page*, 302 F.2d 81 (9th Cir. 1962) 9
White v. *Maryland*, 373 U.S. 59 (1963) 13
Zap v. *United States*, 328 U.S. 624 (1946) 8

STATUTES

K.S.A. 21-401 1
K.S.A. 21-449 1
K.S.A. 60-404 10
28 U.S.C. Sec. 1257 (3) 2

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RESPONDENT'S BRIEF IN OPPOSITION

The petitioner seeks a writ of certiorari to the Supreme Court of the State of Kansas to review the decision of that Court affirming his conviction in the District Court of Shawnee County, Kansas, on a charge of murder in the first degree (K.S.A. 21-401), and kidnaping in the first degree, with harm inflicted (K.S.A. 21-449), and his sentence to imprisonment for life for the offense of murder in the first degree, and to suffer the death penalty for the offense of kidnaping, with harm inflicted. The opinion of the Supreme Court of Kansas is reported at 198 Kan. 479 and is printed in the appendix to the petition.

JURISDICTION

The petitioner seeks to have this Court accept jurisdiction under the provisions of 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Was there an unreasonable search of petitioner's automobile?

2. Does petitioner's failure to object to any evidence secured from his automobile constitute an adequate and independent state ground for rejecting his claim of illegal search?

3. Was petitioner denied due process of law because the trial court refused to provide him with appointed counsel from December 30, 1964, to February 2, 1965, and refused to allow a week's continuance at the time of trial on March 15, 1965?

STATEMENT OF THE CASE

Petitioner's conviction and sentence grow out of the abduction and slaying of Gladys Cora Johnson, a seven-year-old Negro girl, on Saturday, November 14, 1964. The evidence introduced by the prosecution and the defense at petitioner's trial is adequately summarized in the opinion of the Supreme Court of Kansas (Appendix to the petition, pp. 13a to 30a).

Following the abduction of Gladys Cora Johnson in Topeka, Kansas, a massive search was begun to locate her and her kidnaper. This search began the same day, Saturday, November 14, 1964. At about 9:00 p.m. the next

evening petitioner was arrested by the Marysville, Kansas, police and taken to the police station where he was interviewed by an agent of the Federal Bureau of Investigation. When the agent asked, "Would you mind if we looked into your car?", the petitioner replied, "I don't mind at all. You can look at anything I have" (Appellee's Abstract, p. 42). At the station the FBI agent, in the presence of other officers and petitioner's brother-in-law, advised petitioner that he did not have to make a statement, that any statement he made could be used against him, that prior to making any statement he could consult with an attorney or anyone he pleased, and that any statement he made could be used against him in court (Appellee's Abstract, p. 42). The officers searched petitioner's person and found his car keys. Again the FBI agent asked him if it would be all right if they searched his car, and petitioner replied, "You can search anything I have. I have nothing to hide" (Appellee's Abstract, p. 43). The primary concern of the officers at this time was to locate the victim of the kidnaping, who was a seven-year-old child who had been missing less than 48 hours (Appellant's Abstract, p. 134).

While petitioner was being questioned by the FBI agent, two officers and petitioner's brother-in-law went to examine petitioner's car. They looked through the car with a flashlight. They discovered no weapon except a shotgun in the trunk. They also saw some red spots in the trunk. Nothing was removed from the car (Appellant's Abstract, pp. 124-126). After these men returned and reported to the FBI agent, he examined the car himself with similar results. Again nothing was removed (Appellant's Abstract, pp. 128-129).

Around midnight on Sunday, November 15, three police officers and the assistant county attorney from To-

peka arrived in Marysville. Petitioner was again advised of his right to an attorney and that any statement made by him could be used against him. Officer Monthey told him they were going to want to look at his car and to take it to Topeka for processing. Petitioner replied, "Be my guest. Do what you want with it" (Appellee's Abstract, pp. 44-45).

The two policemen who arrested petitioner testified that he appeared to have been drinking, but was not drunk or intoxicated (Appellant's Abstract, pp. 99, 124). Petitioner told the officers that he had done some drinking on Saturday. He did not tell them that he had done any drinking on Sunday (Appellee's Abstract, pp. 64-65). Officer Monthey testified that he could tell petitioner had been drinking because of the odor (Appellee's Abstract, p. 48). However, the same officer testified that during their conversations he seemed to be very coherent, appeared to understand what the officer was saying, and did not at any time act as though he did not understand (Appellee's Abstract, pp. 65, 213).

Early on the morning of Monday, November 16, petitioner and his car were taken to Topeka. About 9:00 a.m. that morning petitioner was served with a warrant issued by the District Court of Shawnee County authorizing police officers to search his car (Appellant's Abstract, p. 148). The car, which had been kept locked, was then thoroughly searched by the laboratory supervisor of the Kansas Bureau of Investigation. Several items taken from the car at this time were later introduced against petitioner at his trial. No objection was entered to the introduction of any of these items, or to the testimony concerning them.

On the night petitioner was brought to Topeka he told his brother-in-law to contact his wife and have her obtain

an attorney for him. On Monday, November 16, he was consulted by an attorney from Kansas City, Kansas, where he and his wife lived.

On November 19, 1964, Mr. Sam Crow, a practicing attorney at Topeka, was appointed to represent petitioner in his preliminary hearing in the Court of Topeka. The hearing was held on November 25, and at its conclusion the petitioner was bound over for trial in the District Court of Shawnee, Kansas.

On December 21, 1964, petitioner filed in the District Court his application for appointment of counsel. The application read as follows:

APPLICATION FOR APPOINTMENT OF COUNSEL

Comes now the defendant and applies to the Court for the appointment of counsel to represent him in the District Court of Shawnee County, Kansas.

On December 23, the District Court appointed Mr. Crow for the limited purpose of representing the petitioner at a hearing December 29, on his application. At the hearing petitioner offered no evidence in support of his application and the court then directed the petitioner be examined under oath by the State. Petitioner testified that he and his wife owned a home in Kansas City, Kansas, valued at $10,000, as well as furniture and two automobiles, all of which were free of indebtedness. He also testified that he had approximately $2,000 deposited with the railroad credit union and about $800 in a bank account, as well as government bonds in an amount between $250 and $500 (Appellee's Abstract, pp. 10-13). Income tax records introduced by the State showed that he and his wife had wages for the year 1963 in the amount of $8,448.74 for petitioner and $5,137.40 for his wife; and

for the year 1962 in the amount of $9,360.24 for petitioner and $5,154.80 for his wife (Appellee's Abstract, pp. 18-21). On the basis of this evidence, the court on December 30, 1964, found that petitioner was not indigent and was able to employ his own counsel, and also that petitioner had made no effort to employ counsel and there was no evidence that any counsel had refused him employment. Accordingly, the petitioner's application for appointment of counsel was denied (Appellant's Abstract, pp. 3-5). Petitioner also testified at the hearing that when charges were filed against him he gave his wife a power of attorney permitting her to transfer title to their property (Appellee's Abstract, p. 14). Although it is not disclosed by the record, on the day following denial of his application for counsel, petitioner's wife filed suit in the District Court of Wyandotte County, Kansas, against him asking for divorce and division of property.

Thereafter, on February 2, 1965, the District Court of Shawnee County, on its own motion, held a hearing to determine whether counsel should be appointed for petitioner. The court found that petitioner did not have counsel of his own choosing and had not employed such counsel, and further that petitioner had advised the court that he did not intend to employ any such counsel. Thereupon, the court appointed Mr. Elwaine F. Pomeroy, an attorney practicing in Topeka, to represent the petitioner (Appellant's Abstract, p. 8).

The trial commenced on March 15, 1965. Petitioner's counsel interviewed every witness who testified, prior to the time of his testimony (Appellee's Abstract, p. 243). Time sheets submitted by petitioner's counsel and his brother who is associated with him in the practice of law indicate that they spent a total of approximately 330 man

hours preparing for trial (Appellant's Abstract, pp. 510-516). On March 12, 1965, petitioner's counsel requested a continuance of one week "so as to allow us to adequately prepare for the defense." No other reason was advanced for the motion, and the reason given was not elaborated. This motion was denied by the court.

The jury returned a verdict of guilty, and petitioner was sentenced as previously indicated. His conviction and sentence were affirmed by the Supreme Court of Kansas on April 8, 1967. He then filed this application for a writ of certiorari.

ARGUMENT

I. There Was No Unreasonable Search of Petitioner's Automobile.

The examination of petitioner's automobile made without a warrant shortly after his arrest, was done for the sole purpose of locating the missing child, Gladys Johnson. The officers were not searching for evidence against the petitioner and nothing was obtained from this examination which was later introduced in evidence against him at trial. For this reason, petitioner is not entitled to complain about the legality of this "search". The only evidence taken from the automobile and introduced against him was obtained after a valid warrant had been issued and served upon him in Topeka. Petitioner has never challenged the validity of this warrant and hence the facts surrounding its issuance are not completely disclosed by the record. However, the record does disclose that a wealth of independent evidence was already in the possession of law enforcement officers, and it may safely be presumed that such evidence provided a sufficient basis for issuance of the warrant, without reli-

ance on anything observed at the time the car was examined to find the missing child.

Furthermore, the record is replete with evidence of petitioner's voluntary and intelligent consent to the initial examination of his car shortly after his arrest. An agent of the Federal Bureau of Investigation, who had assumed charge of the investigation at Marysville, Kansas, when the petitioner was apprehended, testified that he asked petitioner if he would mind if they looked into his car and received the reply, "I don't mind at all. You can look at anything I have" (Appellee's Abstract, p. 42). Following this conversation, petitioner was removed to the police station at Marysville. He was advised of his right to remain silent and the right to consult with an attorney or anyone else he chose (Appellee's Abstract, p. 42). At the police station, petitioner was searched and his car keys removed and the FBI agent again inquired if it would be all right if they searched his car. He was again advised, "You can search anything I have. I have nothing to hide." (Appellee's Abstract, p. 43). Later that same night, Topeka police officers arrived at the scene and interviewed petitioner. At this time he was again advised of his right to remain silent and to consult with counsel (Appellee's Abstract, p. 44). The Topeka police advised him that they were going to process his automobile, to which he responded, "Be my guest. Do what you want with it" (Appellee's Abstract, p. 45).

The rule is well established that the constitutional immunity from unreasonable searches and seizures may be waived by consent to the search or seizure. As this Court said in *Zap* v. *United States*, 328 U.S. 624 (1946):

> . . . the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. 328 U.S. at 628.

Accord: Robbins v. *MacKenzie*, 364 F.2d 45 (1st Cir. 1966), *cert. denied* 385 U.S. 913 (1966); *Chapman* v. *United States*, 346 F.2d 383, 387 (9th Cir. 1965), *cert. denied* 383 U.S. 909 (1965); *United States* v. *Page*, 302 F.2d 81 (9th Cir. 1962); *United States* v. *Brown*, 296 F.2d 565, 566 (4th Cir. 1961); *Shores* v. *United States*, 174 F.2d 838, 845 (8th Cir. 1949); *Ruhl* v. *United States*, 148 F.2d 173, 174 (10th Cir. 1945). For a case in which consent to search an automobile was found under circumstances similar to those presented here, see *Robinson* v. *United States*, 325 F.2d 880, 884 (5th Cir. 1964).

There is no evidence that the petitioner was under the influence of intoxicating liquor at the time he consented to the search of his automobile. Officer Monthey testified that the only evidence that petitioner had been drinking was that of odor (Appellee's Abstract, p. 48). The officer specifically testified that the petitioner was at all times coherent, appeared to understand his statements, and that his own remarks were reasonable, realistic and competent (Appellee's Abstract, pp. 65, 213). There is no reason to believe that petitioner was not in complete control of his faculties. He had been advised of his right to consult with counsel and was in fact in the presence of and consulted with his brother-in-law at the time he consented to the examination.

Aside from the fact that this original examination of petitioner's car did not produce anything used against him and aside from the fact that he voluntarily consented to it, the record reveals that at this time the kidnaping was less than 48 hours old, and the victim was a small child, thinly dressed, whose whereabouts and condition were unknown. The first concern of everyone, as stated by the FBI agent at the trial, was to find the child (Appellant's Abstract, p. 134). A sincere effort to this end, un-

der the circumstances present here, certainly justifies the limited examination of petitioner's automobile without a warrant which was made in this case.

II. The Judgment Below Rejecting Petitioner's Search and Seizure Claim Rests on an Adequate and Independent Ground of Kansas Law.

The record shows that all evidence obtained from petitioner's automobile which was introduced against him was admitted without objection. The court below gave this as one reason for rejecting petitioner's search and seizure claim. It is well settled in Kansas that where evidence is admitted without objection at the trial of a criminal case, belated objections to this evidence on appeal will not be entertained. This so-called contemporaneous objection rule is embodied in K.S.A. 60-404, which provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection.

The Kansas Court has firmly adhered to this rule in its decisions. E.g., *State* v. *Donahue*, 197 Kan. 317, 416 P.2d 287 (1966); *State* v. *Freeman*, 195 Kan. 561, 408 P.2d 612 (1965); *State* v. *Wade*, 190 Kan. 624, 376 P.2d 915 (1962).

This Court recently examined the propriety of such a contemporaneous objection rule in *Henry* v. *Mississippi*, 379 U.S. 443 (1965). The decision reaffirmed the principle that this Court will decline to review state court judgments which rest on independent and adequate grounds of state law, but noted that "a litigant's procedural defaults in state proceedings do not prevent vin-

dication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest." 379 U.S. at 447. Applying this test to the Mississippi contemporaneous objection rule, this Court concluded:

> The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided. 379 U. S. at 448.

The question present in *Henry* as to defense counsel's unfamiliarity with the State rule is not involved here. Petitioner's trial counsel had been a member of the Kansas Bar practicing in Topeka for more than ten years and was well deserving of the high compliment paid him by the Kansas Supreme Court for the representation here provided.

III. Petitioner's Right to Counsel and His Right to Adequate Time for Preparation Were Not Denied.

The trial court's finding on December 30, 1964, that the petitioner was not indigent and therefore not entitled to appointment of counsel is supported by a wealth of convincing and uncontradicted evidence. In particular, he testified that he and his wife owned a home in Kansas City, Kansas, valued at $10,000, as well as furniture and two automobiles, all free of indebtedness; that he had approximately $2,000 on deposit with the Railroad Credit Union, about $800 in a bank account, and government bonds of $250 to $500 (Appellee's Abstract, pp. 10-13). Income tax records introduced in evidence showed that he and his

wife had wages in 1963 totaling over $13,500 and wages in 1962 totaling over $14,500 (Appellee's Abstract, pp. 18-21). Petitioner's application for appointment of counsel stated no supporting reasons, and he offered no evidence in support of it at the hearing December 29, 1964. In fact, he testified in response to questioning by the State that between his preliminary examination and his application for counsel he had made no attempt to secure counsel of his own choosing and that no attorney had refused to represent him (Appellee's Abstract, p. 16). The truth of the matter appears to be that while petitioner could afford his own counsel, he chose to rely upon the court to appoint an attorney at no cost to himself. This is further borne out by his testimony that after criminal charges were filed against him, he gave a power of attorney to his wife permitting her to transfer title to their property (Appellee's Abstract, p. 14). Under these circumstances, it cannot be said that petitioner's right to counsel guaranteed by the United States Constitution was denied.

This is true not only because petitioner could afford to obtain his own counsel, but also because he was not prejudiced in any way by the denial of his application on December 30, 1964. He had previously been represented by appointed counsel for his preliminary hearing, counsel being appointed November 19 for the hearing on November 25. He was represented by appointed counsel at the hearing on his application for appointment of trial counsel on December 29, 1964. On February 2, 1965, the trial court, on its own motion, after hearing, found that petitioner did not have counsel of his own choosing and had advised the court that he did not intend to employ such counsel, and thereupon appointed Elwaine F. Pomeroy of Topeka for the petitioner. The trial did not commence until March 15, 1965, giving counsel approximately six weeks to prepare.

During the period December 30, 1964, to February 2, 1965, nothing occurred which raises even a possibility of prejudice to petitioner at his trial in March. No incriminating statements were taken from him, as in *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *Escobedo* v. *Illinois,* 378 U.S. 478 (1964); and *Massiah* v. *United States,* 377 U.S. 201 (1964). No vital defenses were lost to the petitioner, as in *Hamilton* v. *Alabama,* 368 U.S. 52 (1961), nor was a plea of any kind entered by the petitioner during this period, as occurred in *White* v. *Maryland,* 373 U.S. 59 (1963). For these reasons, the period from December 30 to February 2 did not constitute a critical stage in the proceedings against this petitioner, and denial of his request for appointed counsel at this stage would not have been a denial of his constitutional right to counsel even if he had in fact been indigent.

Certainly it cannot be contended that petitioner's counsel was allowed insufficient time to prepare for trial. Petitioner's counsel admitted, during the hearing on the motion for a new trial, that no witness testified who had not previously been interviewed by him (Appellee's Abstract, p. 243). The time sheets submitted by petitioner's counsel and his brother, with whom he is associated in the practice of law, indicate that a total of approximately 330 man-hours was spent preparing for the trial. Examination of the voluminous trial record reveals that defense counsel was extremely well prepared. Nothing of consequence has been suggested by the petitioner which his counsel might have done to prepare a more adequate defense.

Petitioner's claim that he was denied due process of law because his request for a week's continuance was denied is refuted by this same record of massive preparation on the part of his counsel. The conclusion that counsel was fully prepared for trial is reinforced by the fact

that no particular reason was advanced in support of the motion for continuance, nor was any showing made at the hearing on the motion for a new trial that petitioner was prejudiced in any concrete way by the denial of a continuance.

Petitioner concedes that the granting or denial of a continuance has traditionally been left largely to the discretion of the trial judge. In this case, where review of a state conviction is sought, petitioner must show an abuse of this discretion amounting to a denial of due process of law. No such showing has been made here, where the record reveals thorough and extensive preparation by defense counsel and nothing of consequence that counsel might have done in the extra week requested.

CONCLUSION

For the foregoing reasons, petitioner's claims of constitutional violation are without substance and the writ of certiorari should be denied.

Respectfully submitted,

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